No. 11399.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a corporation,

Appellant,

vs.

FRED HARTLEY,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

Jurisdiction in the District Court was based on 28 U. S. C. A. 41 granting it jurisdiction over suits of a civil nature between citizens of different states where the matter in controversy, exclusive of interest and costs, exceeds $3000.

Respondent, Fred Hartley, brought suit in the Superior Court of the State of California, in and for the County of Los Angeles, against Appellant, Sears, Roebuck & Co. and others (later dismissed as to the others) alleging in his complaint that he had been damaged in the sum of $10,000 through its negligence in the fitting of a hearing aid sold him [pp. 2-8]. (All page references herein are to the printed Transcript of Record.) The action was removed

pursuant to 28 U. S. C. A. 71 to the District Court of the United States for the Southern District of California, Central Division, on a verified petition alleging, among other things, that Fred Hartley was a citizen and resident of the State of California and that Sears, Roebuck & Co., a corporation, was a citizen and resident of the State of New York [p. 10].

Following such removal the action was tried by said District Court which on May 10, 1946, entered a final judgment on a jury verdict in favor of Fred Hartley and against Sears, Roebuck & Co. in the sum of $3,000 general damages, $23.00 special damages, and $63.60 costs [pp. 26-28]. Notice of appeal was filed July 1, 1946 [p. 28]. Appellate jurisdiction in the Circuit Court of Appeals to hear this appeal is conferred by 28 U. S. C. A. 225.

Statement of the Case.

This is an appeal from a judgment on a verdict of $3,000 general damages, $23 special damages, and $63.60 costs in favor of Respondent and against Appellant [pp. 26-28].

The facts out of which the case arose are that Respondent, who had become increasingly hard of hearing over a ten-year period of time [pp. 59-60] purchased a Zenith hearing aid from Appellant's retail store at Ninth and Boyle Streets in Los Angeles on October 13, 1945 [pp. 32, 35, 36]. To secure a good fit for the earpiece, molds were made of respondent's ears by Appelant's employee [pp. 36-38]. After the taking of such molds a

small piece of mold plaster, about one-third of an inch long [p. 91] apparently remained in Respondent's left ear, in the inner third of the ear canal, on the outside of the eardrum [pp. 84, 87]. This was removed from the ear by a physician on October 16, 1945 [p. 86]. There was no hole in the eardrum [p. 87] but on removal of the foreign substance there was a severe amount of inflammation and a little infection [pp. 87-88]. On November 2, 1945, "the whole thing had subsided markedly and was about gone" [p. 88] and Respondent's attending physician further testified that "on November 9th I have a note that he looked normal and we discharged him" [p. 88].

There was no evidence that Respondent, who was foreman of a die shop [p. 59], lost any wages as a result of this injury, or that he would lose wages in the future, or that this accident had impaired his hearing which, Respondent testified, had been getting worse over a period of years [pp. 59-62].

The general damages awarded Respondent were solely to compensate Respondent for the pain which he had suffered as a result of this accident and which he would suffer in the future. [See the instructions on the elements of damages, p. 203.]

The questions involved on this appeal are two:

1. Was it error for the trial court to instruct the jury that they could award Respondent damages for the "physical pain, * * * which he is reasonably certain to suffer in the future therefrom, if any?" This question

was raised by objection and exception in the trial court to said instruction. (Specification of Error No. 1.) Respondent's own physician testified that respondent's ear had returned to normal six months prior to trial [pp. 31, 88]. Respondent testified that the last time he suffered pain was about six and one-half months prior to trial [pp. 79, 80, 31]. There was no testimony that it was even possible that Respondent would suffer pain in the future. Appellant contends that, in the absence of evidence of future pain, the trial court committed prejudicial error in instructing the jury it could award Respondent damages for the physical pain he was reasonably certain to suffer in the future.

2. Was the verdict so excessive as to lead to the conclusion it was based on passion or prejudice? This question arises on appeal from the judgment. (Specification of Error No. 2.) Appellant contends that the pain which Respondent suffered, while regrettable, lasted but a few days, resulted in no loss of wages, and comes so far short of warranting an award of $3,000.00 as to indicate the award was based on passion and prejudice.

SPECIFICATION OF ERRORS.

I.

The Trial Court Erred in Instructing the Jury That the Jury Could Award Respondent Damages for the Physical Pain He Was Reasonably Certain to Suffer in the Future, There Being No Evidence Respondent Would Suffer Future Pain.

The instruction given was as follows:

> "The elements entering into such damages are as follows:
>
> 1. * * * (Special Damages of $23.00) * * *
>
> 2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, *or which he is reasonably certain to suffer in the future therefrom, if any.*" [p. 203].

The objectionable portion has been italicized.

The objection urged against this instruction in the trial court was that it was "unsupported by the evidence." (See written objections Nos. V and VIII to Plaintiff's proposed instructions 14 and 23 wherein Appellant asserted they were "unsupported by the evidence," "There is no evidence that Plaintiff suffered permanent injuries," "There is no evidence he will have future pain and suffering as a result of this accident") [pp. 24, 25]. Oral objection and exception was also made and the case of *Silvester v. Scanlan,* 136 Cal. App. 107, 28 P. (2d) 97 (hearing denied by California Supreme Court) was cited wherein a judgment was reversed because an instruction

allowing recovery for future pain and suffering was given in a case in which the evidence did not support such instruction [pp. 194-196]. The oral objection was later repeated [p. 206]. Appellant also submitted a proposed instruction (No. 13) which the Court refused, except as covered elsewhere, and the language in such instruction which the Court did not give, there or elsewhere, was the following:

> "* * * if you find for the Plaintiff, you should fix your award of general damages in such sum as will compensate Plaintiff for such pain, suffering and anxiety, if any, as you find Plaintiff has suffered in the past as a result of this accident." [p. 23].

This language, which Appellant contends was appropriate, was refused in favor of the language, to which Appellant objected and excepted, that the jury could award Respondent damages for the pain he would suffer in the future.

II.

The Verdict of $3,000 General Damages for the Pain Respondent Suffered or Will Suffer Is so Excessive as to Appear to Have Been Given as a Result of Passion and Prejudice, Thereby Justifying Reversal or Reduction of the Judgment.

This specification is based on an examination of all the evidence on the question of damages, to be considered hereafter in the argument.

Summary of Argument.

1. An instruction that the jury may make an award of damages to compensate for future pain is erroneous if there is no evidence the injured party will sustain future pain. The evidence must show a "reasonable probability" of such pain before an instruction may be given that damages may be awarded for future pain. At the time of trial, and for some time prior to the trial, Respondent's condition was normal. A review of the evidence shows there was no evidence he would suffer future pain, either to a reasonable probability or at all.

2. The pain which Respondent endured, while regrettable, falls far short of what would justify an award of $3,000. He suffered severe pain when his physician endeavored to remove the foreign matter from his ear without an anesthetic, and suffered pain and dizziness intermittently for 12 days thereafter. But there was no loss of wages and no serious medical condition developed. The award of $3,000 for such a temporary suffering, regrettable though such suffering was, is excessive and indicates the jury was influenced by passion or prejudice.

ARGUMENT.

I.

The Trial Court Erred in Instructing the Jury That They Could Award Respondent Damages for the "Physical Pain . . . Which He is Reasonably Certain to Suffer in the Future Therefrom, if Any," There Being No Evidence Respondent Would Suffer Future Pain.

As shown by Specification of Error No. 1 herein, Appellant in the court below not only objected and excepted to this instruction but also proposed an instruction (refused as to this point) limiting the damages to past pain and suffering. Consequently the correctness of this instruction is open to question on this appeal.

A. The Law Is Well Settled That an Instruction That Damages May Be Awarded for Detriment to Be Suffered in the Future Is Erroneous Unless There Is Evidence That Such Detriment Actually Will Be Suffered With Reasonable Certainty.

This question is controlled, in California, by Section 3283 of Civil Code which is as follows:

> "Injuries resulting or probable after suit brought. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, *or certain to result in the future.*" (Italics ours.)

Silvester v. Scanlan, 136 Cal. App. 107, 28 P. (2d) 97 (hearing denied by California Supreme Court), is decisive. In that case a judgment was reversed because the

trial court instructed the jury they could award damages for future suffering. The Appellate Court stated:

> *"Whether this portion of the instruction correctly states the law or not is unimportant, as no instruction on the subject of future worry was justified.* Section 3283 of the Civil Code provides that 'damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.' In construing this section it has been said that to justify a recovery for future consequences the evidence must show with a reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury will not warrant a verdict for damages. (Citing.) Here there was no evidence that plaintiff would with reasonable certainty suffer any future disability as a result of her alleged injuries. . . . Consequences which are contingent, speculative, or are merely possible are not to be considered. It is not enough that the injuries received may develop into more serious conditions than those which are visible, nor even that they are likely to develop. *To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability as amounts to a reasonable certainty that they will result from the original injury.* Here there is no such evidence. By reason of the giving of the instructions referred to, it is impossible to say what portion of the verdict was given to plaintiff for her slight physical injury and subsequent alleged suffering, and what portion represented prospective damages for mental ailments that might or might not be suffered in the future.

"For the reasons given the judgment is reversed." (Italics ours.) (136 Cal. App. 107, 110, 111, 28 Pac. (2d) 97, 99.)

The *Silvester* case was cited with approval and the italicized language setting forth the requirement of evidence of a reasonable certainty of future detriment was quoted with approval in the case of *Bellman v. San Francisco High School District,* 11 Cal. (2d) 576, 81 P. (2d) 894. In the *Bellman* case a judgment for $15,000 for a skull fracture and brain injury of a high school girl was reduced to $5,000 because the evidence of prospective detriment was insufficient. (The propriety of the form of the instructions given was not discussed.) The Court also stated:

"By this section (Sec. 3283), in an action for personal injuries recovery is limited so far as physical suffering, or pain, or mental anguish is concerned, to compensation for the consequences which have occurred up to the time of the trial, or it *is reasonably certain under the evidence will follow in the future.* (Citing.) *The jury may not consider consequences which are only likely to occur.*" (Italics ours.) (11 Cal. (2d) 576, 588, 81 P. (2d) 894, 900.)

The latest decision of the California Supreme Court which discusses Civil Code, Section 3283, is the case of *Caminetti v. Pacific Mutual Life Ins. Co.,* 23 Cal. (2d) 94, 103, 142 P. (2d) 741, 745, 746, which case reaffirms the holding of the case of *Bellman v. S. F. High School District,* 11 Cal. (2d) 576, 81 P. (2d) 894, that future

detriment must be proved to a reasonable certainty to justify an award of damages therefor. In the *Caminetti* case, *supra,* the California Supreme Court held:

> "Of course, the proof must establish with reasonable certainty and probability that damages will result in the future to the person wronged. Civ. Code, Sec. 3283. . . . *It is a question of the degree of proof necessary to establish with reasonable certainty that damage will result.* If the proof does establish with reasonable certainty that future damages will result from the wrong then they may be allowed. Williston, Contracts (rev. ed.), Sec. 1346; Myers v. Nolan, 18 Cal. App. (2d) 319, 63 Pac. (2d) 1216; *see Bellman v. San Francisco H. S. Dist.,* 11 Cal. (2d) 576, 81 Pac. (2d) 894." (Italics ours.) (23 Cal. (2d) 94, 103, 142 P. (2d) 741, 745, 746.)

B. There Was No Evidence That Respondent Was "Reasonably Certain" to Suffer Pain in the Future.

Respondent's attending physician, Dr. Ghrist, testified he was an eye, ear, nose and throat specialist [p. 82]. He testified that on October 15, 1945, he endeavored unsuccessfully to remove the ear plaster from Respondent's ear without an anesthetic [pp. 82, 85]. On October 16, 1945, using an anesthetic, he removed about one-third of an inch of ear plaster [p. 91] from the lower third of the ear canal [pp. 86, 87]. The eardrum was "intact, but red and inflamed" [p. 95]. ". . . there was no hole in the eardrum. I notice that there was a severe amount of inflammation, and the membrane began to swell within a few minutes after the material was removed from the inner third of the ear canal" [p. 87]. He recalled giving no treatment to the ear other than to "flush it out and use

a disinfectant" [p. 87]. On October 17 he looked at Respondent but gave no treatment [p. 87]. On October 19 Respondent "came to my office stating that he still felt sick and dizzy, and we gave him at that time some sulfadiozine" [p. 87]. ". . . there must have been a little infection because I would not have given him the sulfadiozine on October 19th had I thought that it was merely pressure" [p. 88]. "If you take any foreign body and hold it against a membrane a length of time there is generally a little infection . . ." [p. 96]. "I saw him again on October 22nd, at which time he was improved and we discontinued the sulfadiozine" [p. 88]. Dr. Ghrist saw Respondent again on October 29th and "On November 2nd there was—the whole thing had subsided markedly and was about all gone, so at that time we did an audiograph on him to see how much he could hear, or how much he couldn't hear. And then *on November 9th I have a note that he looked normal and we discharged him*" [p. 88]. (Italics ours.)

There is no evidence by the attending physician of any condition which could cause future pain. The testimony of Respondent's physician, a specialist, is that Respondent's ear had returned to normal November 9th, six months prior to the trial. Respondent's physician also testified that his impression of the cause of Respondent's deafness (a progressive condition) was that it was catarrhal [pp. 99, 100]. Dr. George W. Brown, a specialist called by Appellant, testified as follows concerning his examination of Respondent: "So I didn't see anything wrong with his ear from any injury, and according to the tuning fork tests he has catarrhal deafness . . ." [p. 173]. There was no cross-examination on this testimony.

One further aspect of the medical testimony should be noted. There was no evidence whatever that any condition in Respondent's ear was likely to or even possibly could cause Respondent pain in the future. If such a possibility were present it is obvious that Respondent's specialist would have pointed it out in his testimony. The expert evidence, of both sides, is completely in accord with the testimony of the attending physician that Respondent's ear had returned to normal November 9, 1945, six months prior to trial.

Respondent's testimony was that on October 15th Dr. Ghrist tried to remove the plaster without an anesthetic and that Respondent couldn't stand the pain [pp. 46, 48]. It hurt during the night [p. 48]. After the anesthetic on the 16th he slept until the 17th when he had a dull ache [p. 50]. He drove his car home [p. 50], stopping at the factory, where they told him to go home [p. 78]. He returned to work the next morning [p. 78]. About two or three days later Respondent felt dizzy, his ear ached; he saw Dr. Ghrist who prescribed sulfa [p. 51]. He returned to Dr. Ghrist in three or four days, who said, "It is coming along pretty good" [pp. 51-52]. Respondent testified that about October 25th he went home from work sick to his stomach about 1 P. M. and returned to work the following day around noon [pp. 79-80]. He worked a couple of hours and then came home and didn't work Saturday or Sunday [p. 80]. His head started to fill up and his ear started hurting again "so I went and took some more sulfa drugs because I thought the infection

was coming again" [p. 52]. ". . . that Saturday night something seemed to bust in my ear, like it opened up, and then it started to run again, all over the pillow, and then I felt all right" [p. 52].

> "Q. And it didn't pain you after that? A. No; just left me, you know, that there was something there. Then it started getting better from then on" [p. 80].

Since Respondent testified the preceding Thursday was October 25th [p. 79] the night of the following Saturday and Sunday would be the night of October 27-28, 1945. This night, fixed by Respondent as the last time he suffered pain, was 12 days before Dr. Ghrist concluded the ear had returned to normal and discharged him, and was about 6½ months prior to the trial. (The trial was May 8-9, 1946 [pp. 26-27].)

Respondent testified that in addition to the pain that he also had an "annoying feeling, but I figured it would get better by itself" [p. 55]. This feeling was as if a fly was bothering him over the left ear [pp. 55-56]. Respondent did not testify that he ever mentioned this feeling to his physician and Dr. Ghrist testified that he doesn't recall that Respondent ever mentioned it to him [p. 101]. Respondent testified that this subjective sensation lasted "until about five or six weeks ago (prior to trial). It didn't bother me. Just annoyed me is all; no pain" [p. 55].

The foregoing subjective symptom, apparently not considered important enough even to mention to the attending

physician, or so far as the record shows to anyone else prior to the trial, got better by itself as Respondent had expected and ceased five or six weeks before the trial, according to Respondent's testimony. At the time of trial, therefore, six months had elapsed since Respondent's physician, a specialist, had discharged him because his ear had returned to normal. At the time of trial Respondent was normal. At the time of trial it was then 6½ months since Respondent had suffered any pain. There was no testimony, by anyone, that there was even a *possibility* that Respondent would suffer pain in the future. Had such a possibility existed it seems obvious that Respondent's physician, a specialist, would have testified to it.

Against such a factual basis there clearly was no substantial evidence in this case from which the jury could properly conclude that there was a "reasonable certainty" that Respondent would suffer pain in the future. The evidence utterly failed to support such a conclusion. Consequently it was prejudicial error to submit to the jury the question of future pain and instruct the jury that they could award Respondent damages for the "physical pain . . . which he is reasonably certain to suffer in the future therefrom, if any" [p. 203].

II.

The Verdict of $3,000 General Damages for the Pain Respondent Suffered and Will Suffer Is so Excessive as to Appear to Have Been Given as a Result of Passion or Prejudice, Thereby Justifying Reversal or Reduction of the Judgment.

A. There Was No Evidence of Future Pain.

We have previously shown, under Point I, that there was no evidence to support an award for future pain. Consequently the verdict must be considered in relation to the pain Respondent had suffered in the past.

B. The Evidence Shows the Injury and Pain Which Respondent Had Suffered in the Past Were Minor and Temporary.

The evidence concerning his pain has previously been analyzed, under Point I, and the following limits to such pain were clearly established. Respondent's discomfort was principally as follows: On October 15, 1945, his physician attempted to remove the mold plaster without an anesthetic. This caused severe pain [pp. 84-85]. On October 19, 1945, Respondent felt sick and dizzy and Dr. Ghrist gave him some sulfaldiozine [p. 87]. Dr. Ghrist testified—"there must have been a little infection because I would not have given him the sulfadiozine on October 19th had I thought that it was merely pressure" [p. 88]. "I saw him again October 22nd, at which time he was improved and we discontinued the sulfadiozine" [p. 88]. Respondent testified that on October 25th he felt sick again and, without contacting his physician, he took some more sulfa drugs and Saturday night (October 27th) the infection seemed to burst and then he felt all right [pp. 52, 80]. It didn't pain after that [p. 80].

From the foregoing it appears that Respondent suffered pain intermittently for a period of approximately 12 or 13 days.

While such pain is regrettable, it should also be pointed out that there was no evidence of any loss of wages. Respondent, a foreman, presumably could arrange his working hours so that the minor losses of time involved in the treatment of his ear resulted in no loss of wages.

The treatment given by the attending physician, a specialist, shows clearly the minor nature of Respondent's injury. Dr. Ghrist testified that at the time he removed the piece of ear mold he recalls giving no treatment "Other than to flush it out and use a disinfectant" [p. 87]. He testified that on October 19th he gave Respondent some sulfadiozine because "there must have been a little infection" [pp. 87-88]. Although Dr. Ghrist saw Respondent from time to time thereafter until he was discharged from treatment as normal on November 9, 1945, the foregoing comprises all the treatment of the ear by the attending physician. Dr. Ghrist's testimony was corroborated by Respondent:

> "Q. What, if anything, did he do to you each time you went there? A. Never done anything; just looked at it.
>
> Q. Did he give you any other medicine, other than the sulfa? A. No. He told me not to take any more sulfa drugs" [p. 53].

The foregoing review of the medical treatment given Respondent shows that although under the care of a specialist, but little treatment was necessary. In Respondent's words, the doctor "Never done anything; just looked at it" [p. 53]. Since Respondent was in good hands the

inference is irresistible that his condition did not require treatment and, as set forth above, he was soon discharged. While it is unfortunate that Respondent suffered at all, the evidence appears conclusive that his injury was minor and his pain temporary.

C. The Reviewing Court Has Authority to Reverse the Judgment or to Reduce the Award Where the Award Given Is so Excessive as to Make It Appear to Have Been Given as a Result of Passion or Prejudice.

The extent and limitations upon the power of the reviewing court to relieve the defendant from an excessive judgment are well recognized and are expressed by the California Supreme Court in the previously cited case of *Bellman v. San Francisco H. S. Dist.*, 11 Cal. (2d) 576, 586, 81 P. (2d) 894, 899, as follows:

> ". . . the power of this court to relieve a defendant from a judgment for damages in an amount so plainly and outrageously excessive as to indicate that it was arrived at as the result of passion or prejudice has often been recognized and exercised (citing). The measure of damages in an action for personal injuries is the amount which will compensate for all the detriment proximately caused by the negligence of the defendant (citing). Damages must in all cases be reasonable (citing) but what is a reasonable amount is a question upon which there may legitimately be a wide difference of opinion. Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock a sense of justice and raise the

presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts (citing)." (11 Cal. (2d) 576, 586, 81 P. (2d) 894, 899.)

D. The Award in the Case at Bar Is Similar on Its Facts to Awards in Other Cases Which Have Been Held to Be so Excessive as to Indicate They Were the Result of Passion or Prejudice.

While every case must, of course, be considered by itself, some guidance can be obtained from the action of other courts in analogous situations. In the present analysis we are considering an award for past pain and discomfort of relatively brief duration. As pointed out previously there was no evidence that Respondent would suffer pain in the future.

Respondent's verdict being based on the theory of compensation for pain, a very instructive case is *Hallinan v. Prindle,* 17 Cal. App. (2d) 656, 62 P. (2d) 1075 (hearing denied by California Supreme Court). In that case a physician, through the negligence of his assistant, injected formalin instead of novocain into plaintiff, preparatory to a minor operation to remove a cyst. Plaintiff testified to his pain as follows:

> "There was a terrible burning sensation and I screamed with pain and was in terrible agony. After several further injections the pain stopped. . . . I was in the hospital five or six days and for three or four months thereafter Dr. Prindle treated me. The swelling had burst and the wound had broken down . . . and every day he would cut around the wound and bandage it. The treatment was painful at all times. . . ." (17 Cal. App. (2d) 656, 670-671, 62 P. (2d) 1075, 1082.)

There was also evidence that the injury interfered with plaintiff's matrimonial intercourse. The jury returned a verdict for $12,500 which the Appellate Court abated by $5,000. The Court stated:

> "In the case at bar, as we have seen, there was no loss of earning capacity, and the verdict is based upon acute, but brief, pain at the time of the injection of the formalin solution, some pain accompanying the treatment, and the effect of the operation upon the plaintiff's matrimonial relations, as testified to by him. *The first two of these elements would of course be compensated by the recovery of a comparatively trifling sum, and the main ground of the verdict must be the third.*" (Italics ours.)
>
> 17 Cal. App. (2d) 656, 673, 62 P. (2d) 1075, 1083.

It should be noted that the painful treatment, in the *Hallinan* case lasted three or four months. In the case at bar Respondent, as previously pointed out, testified the last time he felt pain was about 12 days after his doctor removed the piece of ear mold. For severe, brief, pain and intermittent pain over several months the Court in the *Hallinan case, supra,* stated that the plaintiff "would of course be compensated by the recovery of a comparatively trifling sum." (The permanent interference with matrimonial intercourse was the ground on which almost all the award, as reduced, was supported.)

In *Davis v. Renton,* 99 Cal. App. 264, 278 Pac. 442 (hearing denied by California Supreme Court), the plaintiff was knocked down by a moving automobile. Her injuries included concussion of the brain, dizziness, loss of memory, fracture of left thumb with possible 50% loss of

motion, pain, bruises, and strains. Some of these symptoms extended until the time of trial. It seems evident that these injuries were much more serious than those of Respondent in the present case. A judgment for $5,000 was reversed as excessive.

In *Aspe v. Pirrelli,* 204 Cal. 9, 10, 266 Pac. 276, a judgment of $2,500 for shock, fear, and injured nerves as a result of an automobile collision was reversed because the Court was "convinced that the full amount of the award is not, as a matter of law, supported by the evidence."

In *Steinbrun v. Smith,* 123 Cal. App. 697, 11 P. (2d) 868, the plaintiff was injured in an automobile accident.

> "Plaintiff testified to the following personal injuries: Two scalp wounds; badly crushed thumb; right index finger cut and bruised; cut on left leg below knee and on right knee; was sore all over; elbow sore; every muscle in his body ached; immediately after the accident he went to the hospital where he was treated by a physician, without remaining all night; thereafter called at the physician's office every day for a week, and thereafter every two or three days for about three weeks. He testified that he went to the scene of the accident on the first and second days after the accident and took measurements and photographs and returned to work on the morning of the third day, as a motorman engineer for the Northwestern Pacific Railroad Company; he further testified that the index finger on his right hand was still sore and painful; that all the physician did was to apply mercurochrome and bind up the cuts and that they healed within three weeks."
>
> 123 Cal. App. 697, 698-699, 11 P. (2d) 868, 869.

In that case a judgment of $1,500, which included $315.05 special damages, was reduced by the trial court to $1,200. The Appellate Court further reduced the judgment to $900. Since there were $315.05 special damages this reduced the award for general damages to $585.95.

It seems to Appellant that the *Steinbrun* case is closely analogous to the case at bar. Where, as in the case at bar, the evidence shows no permanent injuries, awards for pain and inconvenience should be moderate. A large award, when the Court is satisfied that the injury is not serious, shocks the sense of justice of the Court. It indicates passion and prejudice. The foregoing authorities are analogous to the facts of the case at bar because in the awards there considered, as here, the period of pain was of relatively short duration, and no permanent injury was shown. An award of a substantial verdict below was held in such analogous cases to shock the sense of justice of the Court.

III.

Conclusion.

The error of the trial court in submitting the question of future pain to the jury and in instructing them that they could award Respondent damages for the physical pain he was reasonably certain to suffer in the future has resulted in a verdict not based, as it should have been, solely on the discomfort Respondent had suffered in the past. As shown under point II of our argument, the award of $3,000 is excessive for the insubstantial injury Respondent received.

It is difficult to see how, in the facts of the present case, the erroneous submission to the jury of the question of

future pain and the erroneous instruction that the jury could award damages for future pain, when such submission and instruction were not warranted by the evidence, could fail to be prejudicial. Such error has uniformly been accompanied in other cases either by a reduction of the judgment by the Appellate Court or by a reversal of the judgment. In the previously cited case of *Bellman v. San Francisco H. S. Dist.*, 11 Cal. (2d) 576, 81 P. (2d) 894, the Supreme Court held the evidence of future detriment was insufficient because such detriment was not "reasonably certain" and ordered a $15,000 judgment reversed unless Respondent should consent to remit $10,000 thereof. This was a reduction of two-thirds. In the previously cited case of *Steinbrun v. Smith,* 123 Cal. App. 697, 11 P. (2d) 868, where there was also an erroneous instruction the jury could award damages for future detriment the Court reduced the judgment from $1200 to $900 which (deducting $315.05 special damages) reduced the amount awarded as general damages from $885.95 to $585.95. That was a reduction of more than one-third. In the case of *Clark v. Huddleston,* 50 Cal. App. (2d) 311, 122 P. (2d) 952 (hearing denied by California Supreme Court), the Court considered the evidence of future detriment to be insufficient and reversed the judgment on the issue of damages. In the previously cited case of *Silvester v. Scanlan,* 136 Cal. App. 107, 111, 28 P. (2d) 97, 99 (hearing denied by California Supreme Court), involving the giving of an instruction authorizing an award for future detriment when the evidence did not justify such an instruction, the Court held:

> "By reason of the giving of the instructions referred to, it is impossible to say what portion of the verdict was given to plaintiff for her slight physical

injury and subsequent alleged suffering and what portion represented prospective damages for mental ailments that might or might not be suffered in the future.

For the reasons given the judgment is reversed."

In the case at bar, it is impossible to determine how much of the $3,000 general damages were awarded Respondent for his slight physical injury and subsequent temporary pain and how much represented prospective damages for pain to be suffered in the future, which prospective damages, as previously pointed out, were entirely unsupported in the case at bar.

The judgment should be reversed or, as a condition to affirmance in view of the error in the instructions and the excessive award, the judgment, in Appellant's opinion, should be reduced to $1,000.

Respectfully submitted,

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